

OFFICE OF SPECIAL MASTERS

(Filed: August 29, 2006)

DO NOT PUBLISH

MARTY and KELLIE AVERA,)	
as parents and next friends of their son,)	
CONNOR AVERA,)	
)	
Petitioners,)	
)	
v.)	No. 04-1385V
)	Attorney's Fees; Attorney's Costs;
SECRETARY OF)	Personal Expenses; Laffey Matrix
HEALTH AND HUMAN SERVICES,)	
)	
Respondent.)	
)	

DECISION ON ATTORNEY'S FEES, ATTORNEY'S COSTS AND PERSONAL EXPENSES¹

Petitioners, Marty Avera and Kellie Avera (Mr. Avera and Ms. Avera or the Averas), as next friends of their son, Connor Avera (Connor), seek an award of attorney's fees, attorney's costs and personal expenses as defined by General Order No. 9 for an action that they pursued under the National Vaccine Injury Compensation Program (Program).² The Averas filed an initial fee petition on February 27, 2006. *See* Notice of Filing, filed February 27, 2006 (Fee Petition). The Averas' attorney of record, Robert T. Moxley, Esq. (Mr. Moxley), maintains his law practice in Cheyenne, Wyoming. The Averas requested \$200.00 an hour for the work that Mr. Moxley performed. *See* Fee Petition, Tab A at 1. They requested \$100.00 an hour for work that Mr. Moxley's assistant, Julie

¹ As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire decision" will be available to the public. *Id.*

² The statutory provisions governing the Vaccine Program are found in 42 U.S.C. §§ 300aa-10 *et seq.* For convenience, further reference will be to the relevant section of 42 U.S.C.

Hernandez (Ms. Hernandez), a law school graduate who did not gain admission to the Wyoming bar until late October 2005, performed between July 2004 and October 2005. *See* Fee Petition, Tab A at 1; *see also* Fee Petition, Tab E at 1-6. They requested \$130.00 an hour for work that Ms. Hernandez performed after October 2005. *See* Fee Petition, Tab A at 1; *see also* Fee Petition, Tab E at 4.

The Averas filed an amended fee petition on March 27, 2006. *See* Notice of Filing, filed March 27, 2006 (Amended Fee Petition). They assert the application of “‘updated’ or ‘adjusted’ Laffey Matrix rates.” Amended Fee Petition at 3. They contend that the Laffey Matrix, “utilized by the District of Columbia Circuit for counsel practicing in Washington[,] D[.]C[.], in the area of complex federal litigation,” is the appropriate reference for an attorney’s hourly rate in Program cases. *Id.* They request \$574.00 an hour for the work that Mr. Moxley performed between July 2004 and July 2005. *See* Amended Fee Petition, Tab A at 1-4. They request \$598.00 an hour for work that Mr. Moxley performed after July 2005. *See* Amended Fee Petition, Tab A at 4-6. They request \$130.00 an hour for work that Ms. Hernandez performed between July 2004 and May 2005. *See* Amended Fee Petition, Tab A at 1-4. They request \$136.00 an hour for work that Ms. Hernandez performed between June 2005 and October 2005. *See* Amended Fee Petition, Tab A at 4-6. They request \$240.00 an hour for work that Ms. Hernandez performed after October 2005. *See* Amended Fee Petition, Tab A at 6.

Respondent does not contest the award of reasonable attorney’s fees, attorney’s costs and personal expenses as defined by General Order No. 9 in this case. *See generally* Response to Petitioners’ Motion to Amend Fee Petition (Response), filed May 19, 2006. However, respondent objects strenuously to the use of the Laffey Matrix. *See* Response at 4-12. In addition, respondent objects broadly to the number of hours that Mr. Moxley and Ms. Hernandez claim. *See* Response at 13-14.

The Averas did not receive Program compensation. Nevertheless, the statute enacting the Program accords discretion to the special master to “award an amount of compensation to cover” the Averas’ “reasonable attorneys’ fees and other costs” as long as “the special master or court determines that” the Averas possessed “a reasonable basis for the claim” and that the Averas filed the petition “in good faith.” § 300aa-15(e)(1); *see, e.g., Di Roma v. Secretary of HHS*, 1993 WL 496981 (Fed. Cl. Spec. Mstr. Nov. 18, 1993). As the United States Supreme Court has cautioned in cases involving other fee-shifting schemes, the special master’s “discretion is not without limit.” *Blanchard v. Bergeron*, 489 U.S. 87, 89 n.1 (1989). Thus, absent “special circumstances,” the special master “should ordinarily” award attorneys’ fees and costs to an unsuccessful petitioner. *Id.*, *citing Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968); *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983).

Throughout the Program’s history, the United States Court of Appeals for the Federal Circuit (Federal Circuit) and the United States Court of Federal Claims (Court of Federal Claims) have held consistently that the lodestar method is the appropriate calculus for the award of attorney’s fees. *See, e.g., Saxton v. Secretary of HHS*, 3 F.3d 1517, 1521 (Fed. Cir. 1993); *Rupert v. Secretary of HHS*

(Rupert IV), 55 Fed.Cl. 293, 298 (2003); *Rupert v. Secretary of HHS (Rupert II)*, 52 Fed.Cl. 684, 686-87 (2002); *Hines v. Secretary of HHS*, 22 Cl.Ct. 750, 753-54 (1991); *Morris v. Secretary of HHS*, 20 Cl.Ct. 14, 27 (1990); *Davis v. Secretary of HHS*, 19 Cl.Ct. 395, 402 (1990); *Monteverdi v. Secretary of HHS*, 19 Cl.Ct. 409, 413-14 (1990); *Whitledge v. Secretary of HHS*, 19 Cl.Ct. 144, 149 (1989); *Clark v. Secretary of HHS*, 19 Cl.Ct. 113, 131 (1989); *Willcox v. Secretary of HHS*, 18 Cl.Ct. 870, 874 (1989); *Bell v. Secretary of HHS*, 18 Cl.Ct. 751, 760 (1989); *Dunham v. Secretary of HHS*, 18 Cl.Ct. 633, 641 (1989); *Pusateri v. Secretary of HHS*, 18 Cl.Ct. 828, 829-30 (1989); *Newton v. Secretary of HHS*, 18 Cl.Ct. 665, 669-70 (1989); *Reddish v. Secretary of HHS*, 18 Cl.Ct. 366, 378-79 (1989); *Ciotoli v. Secretary of HHS*, 18 Cl.Ct. 576, 590-91 (1989); *Matthews v. Secretary of HHS*, 18 Cl.Ct. 514, 537-38 (1989). The “centerpiece” of the lodestar method is the concept of the prevailing market rate for an attorney’s services. *Blanchard*, 489 U.S. at 94. The prevailing market rate is the rate “prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.” *Blum v. Stetson*, 465 U.S. 886, 895-96 n.11 (1984). The Court of Federal Claims endorses a “traditional geographic rule” to define an attorney’s relevant “community.” *Rupert II*, 52 Fed.Cl. at 688-91. More recently, the Chief Special Master decided that an attorney who appears frequently in Program cases and who maintains a practice in the Virginia suburbs of Washington, D.C., was not entitled to Laffey Matrix rates. *See Ray v. Secretary of HHS*, No. 04-0184V, 2006 WL 1006587 (Fed. Cl. Spec. Mstr. Mar. 30, 2006).

The Averas recognize their dilemma. Describing “virtually every” Program decision on attorney’s fees as a “misbegotten legal pronouncement,” Petitioners’ Reply to Respondent’s “Response to Petitioners’ Motion to Amend Fee Petition,” filed June 19, 2006, at 4, the Averas move “for a seminal *legal* ruling on statutory attorneys fees.” Petitioners’ Memorandum of Law in Support of Reasonable “Laffey Matrix” Rates, filed August 16, 2006, at 1 (emphasis added). Indeed, the Averas proclaim, they “literally seek the implementation of a *new* paradigm.” *Id.* (emphasis added).

The Averas do not understand apparently the special master’s role in Program proceedings. As the Federal Circuit iterated in *Althen v. Secretary of HHS*, 418 F.3d 1274 (Fed. Cir. 2005), “[q]uestions of law regarding the interpretation or implementation of the Vaccine Act are matters for the courts.” *Id.* at 1280. The special master applies merely “the law” as announced by the Federal Circuit and the Court of Federal Claims. *Id.* Given the substantial jurisprudence regarding the lodestar method in Program cases, the special master possesses no authority “to craft a new legal standard to be used in” attorney’s fees cases, as the Averas urge. *Id.* at 1281.

The special master has considered carefully the record as a whole. Based upon his experience, he determines that the rates reflected in the Averas’ initial Fee Petition are proper. Therefore, Mr. Moxley shall receive \$200.00 an hour for his work; Ms. Hernandez shall receive \$100.00 an hour for her work between July 2004 and October 2005; and Ms. Hernandez shall receive \$130.00 an hour for her work after October 2005. Likewise, based upon his experience, the special master approves in their entirety the hours that Mr. Moxley and Ms. Hernandez claim.

The Averas shall receive \$9,548.00 in attorney's fees, *see* Fee Petition, Tab A at 1; \$675.77 in costs;³ and \$1,850.00 in personal expenses as defined by General Order No. 9. *See* Fee Petition, Tab D at 1; *see also* Supp. Cost Statement ¶¶ 3-5. In the absence of a motion for review filed under RCFC Appendix B, the clerk of court shall enter judgment in the Averas' favor for \$12,073.77.⁴ The judgment shall reflect that Mr. Moxley may collect \$10,223.77 from the Averas.⁵ Under Vaccine Rule 11(a), the parties may expedite entry of judgment by filing a joint notice renouncing the right to seek review.

The clerk of court shall send the Averas' copy of this decision to the Averas by overnight express delivery.

John F. Edwards
Special Master

³ \$566.26 in costs (*see* Fee Petition, Tab E at 13) + \$150.00 for filing fee (*see* Supplemental Sworn Declaration in Support of Revised Statement of Attorney's Costs and Personal Expenses (Supp. Cost Statement), filed August 16, 2006, ¶ 6) - \$40.49 remainder in trust account (*see* Supp. Cost Statement ¶ 6).

⁴ \$9,548.00 + \$675.77 + \$1,850.00.

⁵ \$12,073.77 - \$1,850.00 for the Averas' personal expenses as defined by General Order No. 9.